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Expert Analysis

Fiduciaries and Settlements: SCPA 2102 Is an Important, Under-Utilized Tool

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Settlement Agreement: SCPA 2102 provides an array of strategies to exploit against a fiduciary, yet its practicality is often under-utilized. Under this section titled "Proceedings for Relief Against a Fiduciary" are six subsections of various proceedings that can be commenced requiring a fiduciary to do everything from supplying information regarding the assets of an estate, forcing fiduciaries to pay the claims of creditors or the payment of advance bequests to beneficiaries.

This article will focus on SCPA 2102(4), which can be effectively used to compel the payment of a claim or a legacy and then (later) compel compliance with a settlement agreement—a tactic which was recently shown in *Estate of Petschek*, a case out of New York County Surrogate's Court. In *Petschek*, an SCPA 2102 proceeding was first utilized to settle a dispute concerning the failure of the fiduciary to fund testamentary trusts, then a second SCPA 2102 proceeding was commenced to compel compliance with a settlement term sheet.

This article will review *Estate of Petschek* as a way to demonstrate a practical use of SCPA 2102.

'Estate of Petschek'

In *Estate of Petschek*, decedent died in 2009 leaving a substantial estate. Under his admitted will, decedent established a trust for his widow's lifetime benefit which was to be funded with his London apartment and 25 percent of his residuary estate "before the payment of debts, administration and funeral expenses and taxes." The decedent's three children from a prior marriage were the remainder beneficiaries of the Trust. The children were also the beneficiaries of the balance of the residuary estate. Decedent gave the trustee discretion to distribute to his widow any or all of the trust principal, and further permitted the widow to withdraw part or all of the trust principal after the 19th month after decedent's death. It was directed that such withdrawal "shall be subject to prior or concurrent payment by [petitioner] or by [the executor] or by the trustees of [the trust] … of all [federal] estate taxes and any interest and penalties due in connection with any such withdrawal … ."

SCPA 2102(4) can be effectively used to compel the payment of a claim or a legacy and then (later) compel compliance with a settlement agreement.

Three years after decedent's death, his widow (petitioner) and the trustee of the Trust commenced an SCPA 2102 proceeding alleging that the executor had not yet funded the Trust and asking the court to either: (1) direct the executor to pay estate taxes allocable to the Trust and order him to

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distribute to Petitioner outright the assets bequeathed to the Trust or (2) direct the executor to distribute to the trustee the assets bequeathed to the Trust. Executor (and, after successfully intervening the children) argued that the Trust could not be funded because petitioner had not disclosed transactions she undertook as agent under a power of attorney. It was alleged that this information could affect the size of petitioner's share of the residuary estate.

After much litigation, petitioner and the children executed a settlement term sheet wherein the parties (1) agreed to an amount that the estate would pay to petitioner; (2) executor agreed to indemnify petitioner as to any inheritance taxes; and (3) the exchange of mutual general releases. The executor did not sign the term sheet and did not comply with the directives therein.

Petitioner then brought a second SCPA 2102 proceeding, seeking an order directing the executor to comply with the term sheet. Petitioner argued that the term sheet is binding on the estate since the children, who are the only other persons interested in decedent's estate, had all signed the document. The children were joined in the proceeding and also opposed the enforcement of the term sheet.

Upon review, the court found that petitioner had established a prima facie case for summary judgment because the term sheet was signed by petitioner and by all of the individuals who would ultimately bear the burden of its substantive obligations. The burden then shifted to the children to show that material issues of fact remain open as to the enforceability of the term sheet. In this respect, the children offered several arguments. The first two arguments which related to the alleged failure to include a material term and the alleged vagueness of the term "general releases" were dismissed by the court with little discussion.

More interesting was the court's review of the argument that the absence of the executor's signature per se rendered the term sheet unenforceable against the children—even though they themselves had signed it. In its analysis the court reviewed whether the executor was a necessary party to the contract.

The court found that it was undisputed that at the time the term sheet was executed the estate assets were more than sufficient to cover the estate's liabilities after payments to petitioner pursuant to the term sheet. Since there was no claim that the term sheet's provisions might expose the executor to a surcharge for failure to meet estate liabilities, the court determined that the executor had no personal stake in the substance of the parties' settlement. The court found that the rights and obligations within the term sheet belonged solely to the children and petitioner. Thus, only their signatures, and not the executor's, would be necessary to make the instrument binding.

The court continued that even if executor's cooperation is needed to implement some aspects of the parties' settlement, he is obligated to do so only by reason of his fiduciary office. He is not obligated because he is a party to a contract with petitioner and the children. The court viewed the unexecuted signature line for the executor as "surplusage" that was immaterial to the term sheet's enforceability against the children and petitioner.

The court granted summary judgment to petitioner and directed executor to effectuate the provisions of the term sheet.

Practical Implications

Now, it certainly appears that there is more to this story than what appeared in the decision. However, this case demonstrates how practically SCPA 2102 can be used to ensure that an estate is being properly administered in a timely fashion (and hopefully provide a catalyst when an estate is languishing).

Petschek is also a cautionary tale to fiduciaries to closely analyze their role and interest in any settlement agreement concerning an estate or trust. A fiduciary should not stand in the way of settlement when he or she does not have an interest, other than the need for their cooperation to implement some aspects of an agreement.